

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1427

To be argued by
THOMAS H. SEAR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1427

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAMUEL GLOVER,

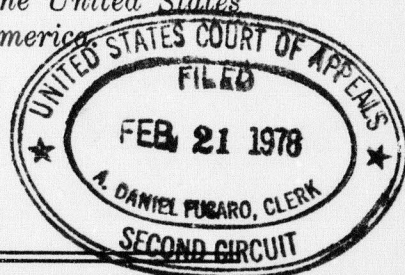
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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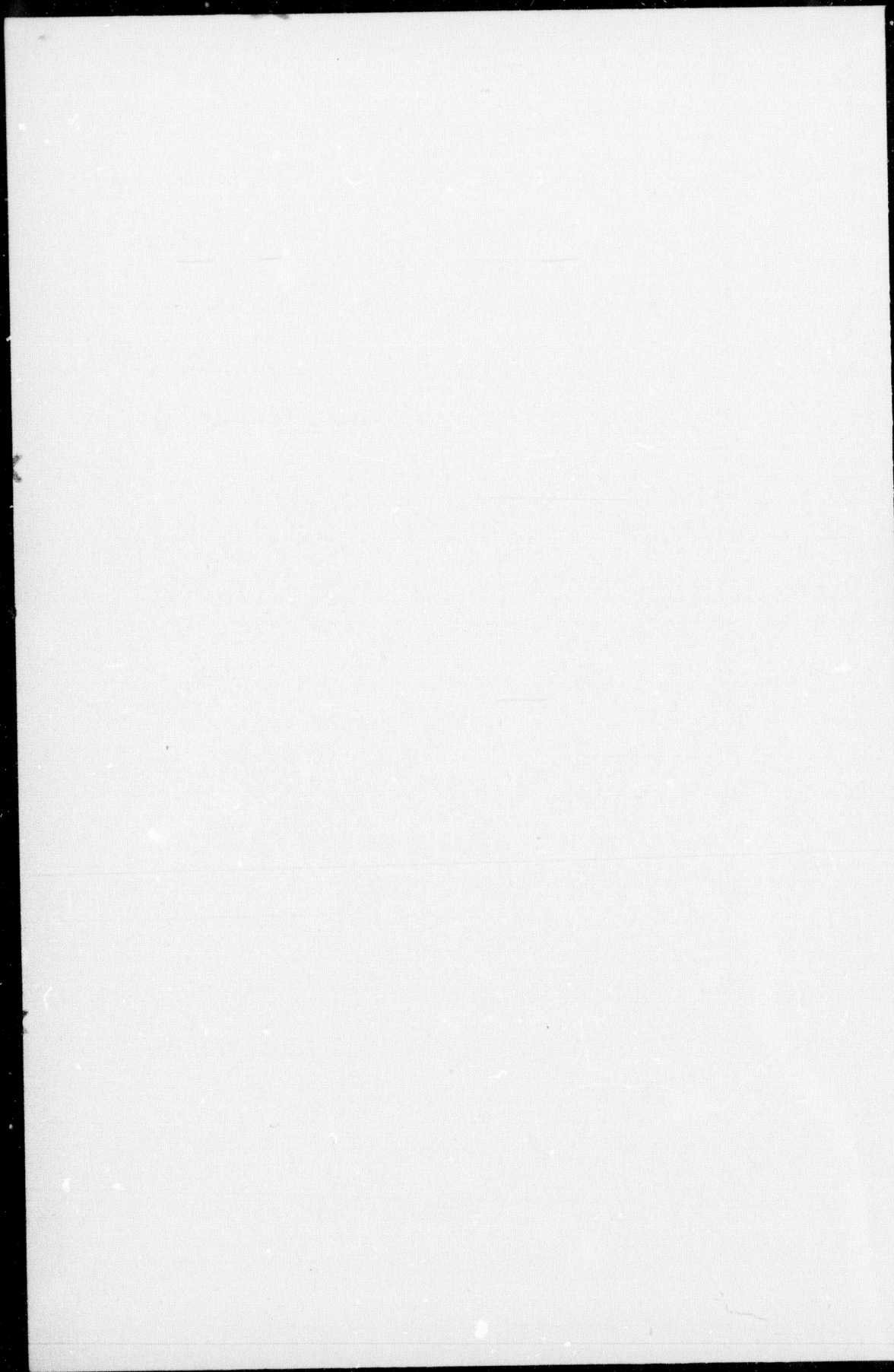


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—V.—

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Samuel Glover appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on September 16, 1977, after a six-day trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Indictment 77 Cr. 202, filed on March 18, 1977, in Count One charged Samuel Glover, Harold Epstein, Robert Daly, John Connerton and John McGuiness, with conspiracy to distribute methamphetamine, in violation of Title 21, United States Code, Section 846. Count Two charged Glover and three others with an actual distribution of approximately 110.81 grams of methamphetamine

on December 30, 1976, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B) (1970).*

Trial on the indictment commenced as to defendants Epstein and Glover on July 18, 1977,** and continued until July 25, 1977 when the jury returned verdicts of guilty as to both defendants on all counts in which they were named.

On September 16, 1977, Glover was sentenced to a year and a half in prison on Count One, with three years special parole, and the imposition of sentence was suspended on Count Two, except for a probation term of three years, to commence upon his release from incarceration on Count One.***

Glover is serving the sentence imposed by Judge Metzner.

* Epstein, Connerton and McGuiness were the other defendants named in Count Two with Glover. All defendants except Glover were charged in the second substantive count (Count Three) which was based on a sale of methamphetamine on February 11, 1977. Connerton was charged in Count Four with use of a firearm in the commission of a felony, based on his use of a .38 caliber revolver during the December 30, 1976 sale, in violation of Title 18, United States Code, Section 924(c).

** Daly fled when agents attempted to arrest him on March 10, 1977 and never has been apprehended. Connerton became a fugitive while on bail after his arrest and remains a fugitive. McGuiness pleaded guilty to Count One and received a sentence of six months in prison to be followed by three years special parole.

*** Epstein, who had been continued on bail after the jury verdict, failed to appear for his sentence and remains a fugitive.

Statement of Facts

The Government's Case

A. Synopsis

The proof at trial of the conspiracy charged in this case gave accurate glimpses of a small but well organized methamphetamine operation. At the heart of the operation was Harold Epstein, who surrounded and insulated himself with others: Samuel Glover, John Connerton, Robert Daly and John McGuiness. Using Glover and his associates to sell the dangerous wares, Epstein remained protected in the background, while he profited from his ventures along with Glover and the others. DEA agents successfully infiltrated the illicit operation through an introduction by a cooperating informant, Joseph Lewis, and consummated two sales of methamphetamine with defendants by posing undercover as narcotics purchasers.

B. Lewis Begins to Cooperate and Meets with McGuiness.

On July 28, 1976, Joseph Lewis was arrested by Rockland County authorities for possession of one and three-quarter ounces of marijuana and possession and sale of one-half ounce of cocaine (Tr. 115, 531).^{*} The next month, August, 1976, Lewis continued his criminal asso-

^{*} "Tr." refers to pages of the trial transcript; "GX" to Government Exhibits either received in evidence or marked as exhibits at trial. The Government witnesses at trial were Lewis, Drug Enforcement Administration Agents John Dowd, Alfred Cavuto, Joseph Vigna, Paul Sennett, Ronald Cantanese and Edward Guillen, Grace Harbison of the Cashier's Office of the Clerk of the United States District Court of the Southern District of New York, Salvatore Scalonga, a friend of the defendant Epstein, and Rosemary Vena, a/k/a Rosemary Vail, the common law wife of Epstein.

ciations and was introduced to defendant John McGuinness. McGuinness had with him at the time a quantity of "speed," that is methamphetamine, in powder form, which he offered to sell. (Tr. 117).^{*} Although Lewis did not transact business with McGuinness until much later in November, at the August meeting Lewis talked with McGuinness about the possibility of purchasing "speed," and expressed a likely interest in a deal. (Tr. 117, 180). Subsequent to this meeting and after discussions with his lawyer, Lewis decided in September, 1976 to cooperate with DEA authorities.^{**}

In his role as a cooperating informant Lewis talked with McGuinness on different occasions in September and October, 1976, both in person and over the telephone. Lewis also introduced an undercover DEA agent, Alfred Cavuto, to McGuinness. (Tr. 118-19, 214-16). In several conversations with Lewis and Cavuto, some of which were recorded, McGuinness discussed the sale of approximately a pound of "speed" to them. (Tr. 120, 216). During one of these conversations, recorded on October 4, 1976, McGuinness, in discussing the possible future sale of "speed" to Lewis, said to Lewis:

"... I've done, I've done a couple of things with you, and I've been truthful all along, when you asked me if it was cut, I said yes, with sugar. Right, remember the first time you copped? And

^{*} Methamphetamine is commonly referred to in street parlance as "speed." Addicts who use it, commonly referred to as "speed freaks," either take methamphetamine in pill form or, after the powder has been dissolved, inject it in liquid form.

^{**} The fact and substance of Lewis' cooperation was later brought to the attention of Rockland County authorities. In May, 1977, Lewis received a sentence of lifetime probation on the state charges which led to his July, 1976 arrest. (Tr. 118).

then the second time I told you it was pure and it was pure . . .

(GX 26, Page 16, Tr. 799) *

McGuiness' preliminary discussions with Cavuto and Lewis reached fruition on November 15, 1976, when McGuiness sold to Cavuto and Lewis an ounce of methamphetamine for \$1300. (Tr. 120-21, 218-19). McGuiness, however, did not reveal his source.

C. McGuiness Introduces Cavuto and Lewis to the Other Conspirators, Including Glover.

Following the November sale, negotiations for larger amounts continued. On December 29, 1976, McGuiness introduced Cavuto and Lewis to defendant John Conner-ton. McGuiness and Connerton agreed to sell one-quarter pound of high quality white "speed" for \$5300. (Tr. 126-134, 219-23). Connerton and McGuiness, however, insisted that the transaction would have to take place in a prescribed manner—they would take Lewis and Cavuto to the general vicinity of the East 60's in Manhattan, and McGuiness and Connerton then would go get the speed and bring it back to Lewis and Cavuto in Lewis's van, so that Lewis or Cavuto could test it before handing over the purchase money. (Tr. 132, 222). Cavuto and Lewis agreed to the plan and arrangements were set for the next day.

On December 30, 1976, according to the plan, Conner-ton and McGuiness directed Lewis and Cavuto to the

* In the October conversation, Lewis did not respond to McGuiness' comment. When questioned by DEA agents and an Assistant United States Attorney prior to trial and at trial about McGuiness' statement, Lewis, who freely had admitted his past cocaine dealings with others (Tr. 114), denied having engaged in any transactions with McGuiness prior to November 1976. (Tr. 120-21, 180, 792).

vicinity of 66th Street and 1st Avenue in Manhattan. (Tr. 135-39, 229). Connerton left the car to get the "speed" from the source and entered the building located at 1214-16 1st Avenue, which is on the east side of the avenue about halfway between 65th Street and 66th Street.* A few minutes later Connerton left the building and started walking back towards the van. (Tr. 140, 229-30, 477-78). As Connerton made his way back to the van, defendant Samuel Glover, conducting counter-surveillance,** came out of the building Connerton just had left and closely watched Connerton until he went around the corner on East 66th Street. Glover then returned to the building. (Tr. 478).

When he got back in the van, Connerton explained to Cavuto and Lewis that his source insisted that the deal go down in the apartment because "he feels protected in the apartment." (Tr. 230). When Cavuto objected to the change in plans, McGuiness stated that he would "lose" the source as a connection if the deal did not go down. He then revealed to some degree the scope and magnitude of the "speed" business done by the source and his people:

"This guy is very big, he is one of the biggest speed dealers in Manhattan. He doesn't need my business. He's got regular quarter-pound, pound customers." (Tr. 231).

Cavuto and Lewis left the area to confer, and returned shortly later to propose an alternative procedure: Lewis would go into the apartment with \$3300, pick up the speed, bring it out to Cavuto and if it was okay, Lewis

* Connerton left a .38 caliber revolver in the van. This weapon was the basis for the firearms charge contained in Count Four of the indictment.

** Connerton's actions, and then Glover's, were observed by a DEA agent on surveillance. (Tr. 477-78).

then would go back to the apartment with the remaining \$2000.* (Tr. 231-32). Connerton and McGuiness agreed to the alternative solution; Lewis and Connerton then proceeded to Apartment 1B at 1214-16 1st Avenue which was rented by defendant Harold Epstein under the alias "Allen Hertz." (Tr. 143, 438-39; GX 13A, B, C, D, E).

Epstein, the source, did not personally get involved in the exchange of methamphetamine for cash. Upon entering the apartment, Lewis was introduced to Glover by Connerton who referred to Glover as "Sam." Pleasantries were exchanged, the three men sat down in one room and Connerton then went through a door toward the back of the room. (Tr. 144). Connerton returned momentarily with about 2 ounces of methamphetamine and handed it to Lewis. (Tr. 684-85). Lewis performed certain tests on the white powder and voiced his approval to Glover and Connerton. (Tr. 145). He then gave Connerton \$2600 in cash. Connerton counted the money and then gave the money to Glover who also counted it. (Tr. 147). Lewis then left, returned to the van and gave the powder to Cavuto. (Tr. 147-48). Cavuto left the van, tested the powder, returned to the van and commenced the same procedure again. Accompanied by Connerton, Lewis took the remaining money, \$2700, into the apartment. Connerton went behind the closed door and returned with the additional two ounces. Connerton and Glover both counted the money that Lewis handed over; Lewis indicated his approval and left. (Tr. 148-50, 233-34).

* In fact Cavuto refused to go into the apartment because, based on Connerton's reference to "Eppy" and the location of the apartment, he believed Harold Epstein to be the source. Cavuto had arrested Epstein on narcotics charges a few years earlier and was afraid that Epstein would recognize him as a DEA agent. (Tr. 245-46).

D. Defendants Plan Further Deals With Cavuto

On January 6, 1977, in a recorded telephone conversation, Agent Cavuto discussed the successful December 30th transaction and the possibility of getting together again with McGuinness and Connerton. McGuinness confirmed that "Eppy," who Cavuto knew to be defendant Harold Epstein,* was the source for the "speed" sold in the December deal. (Tr. 238-39).

The next day, Cavuto met with Connerton at a restaurant in Manhattan. In a lengthy recorded conversation, Connerton explained in detail his relationship to "Eppy" and the nature and extent of Eppy's "speed" business. Connerton also made clear the exact role of defendant Glover, "Sammy," and why Glover, instead of Epstein, had met with Lewis on December 30, 1976. (Tr. 239-42; GX 1 N).** At first, in an attempt to hide the true identity of the source, Connerton pretended that the man who had met with Lewis—Glover—in fact was the source, "Eppy." (GX 1 AN p. 6). However, Connerton then admitted that "Sammy," who had met with Lewis, actually was Epstein's "alter ego so to speak," "a front guy for Eppy." (GX 1 AN p. 23). Connerton revealed that Sammy "takes all the money" for "Eppy" because "Eppy" was paranoid about meeting people. *Id.* Connerton elaborated further:

* Epstein's common law wife Rose Vena, and two of his acquaintances, Salvatore Scalonga and Joseph Daniele (a defense witness), testified at trial that Epstein was known as "Eppy." (Tr. 438-39, 432, 693-94). Also, Epstein has a tattoo which reads "Eppy." (Tr. 688).

** All the tape recordings played at trial were part of a GX 1 series, i.e., GX 1J, GX 1N and the corresponding transcripts were part of a GX 1A series, i.e., GX 1AJ, GX 1AN.

"... you know ... Eppy's on one side of the door and Sammy's on this side of the door. As far as everybody knows, this is Eppy." (GX 1 AN p. 24).

Finally, Connerton made plain that Glover's role was not strictly limited to acting as a front man, but also was a strong-arm for Epstein:

"Connerton: (inaudible) you don't see Eppy without Sammy you know. It's very rare.

Cavuto: Really.

Connerton: Yeah, if he doesn't have Sammy with him, he has this other guy Billy. He [sic] kinda like a torpedo you know. Just like a body-guard type. (GX 1 AN p. 31).

After the revealing January conversation, Cavuto met with Connerton again later in the month and in February. Cavuto also talked with Connerton over the phone. The point of all these conversations had to do with another deal in which the speed would come from "Eppy." (Tr. 277-91). An agreement finally was reached, and on February 11, 1977, Cavuto, undercover DEA agent Ronald Catanese, Connerton and defendant Robert Daly, proceeded to 1st Avenue and 66th Street in Manhattan. (Tr. 292-93). Daly went into the building at 1214-16 1st Ave. to get the speed from "Eppy." (Tr. 294). While he was gone, Connerton called Epstein's apartment and discussed the amount that was to be sold. (Tr. 194-96; 688).^{*} Daly returned with 2 ounces of

^{*} Surveillance established that Epstein was in the apartment at the time. (Tr. 52-53, 492-95).

Among the additional evidence which helped establish conclusively Epstein's role as source of the "speed," was testimony and exhibits which showed that on the day he was arrested, Epstein had in his possession one \$20 bill used as buy money by the DEA in the December 30 transaction and two \$100 bills used as buy money in the February 11 transaction. (Tr. 61-62, 483-8, 496, 253-60, 628-37, 656-77).

methamphetamine and was paid \$2700 by Cavuto. (Tr. 298).*

On March 10, 1977, Connerton and Daly were in the process of selling to Cavuto and Catanese approximately one-quarter pound of "speed" that had come from a source other than Epstein, when Connerton was arrested and Daly fled.

The Defense Case

Neither Glover nor Epstein testified. The only defense witness was Joseph Daniele, a friend of Epstein's who was called by him and whose very brief testimony related solely to certain details surrounding Epstein's arrest. (Tr. 693-96).

A R G U M E N T

POINT I

The Government Did Not Violate Its Obligations Under *Brady v. Maryland*.

Glover alleges that the Government failed to comply with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) in two respects. First, defendant argues that the Government should have disclosed the details of a conversation between the prosecutor and defendant John McGuiness which related to McGuiness' alleged prior drug dealings with the informant Lewis. Second, Glover argues that the Government was required to reveal the names of

* No agent or cooperating individual entered Epstein's apartment on February 11 and in the absence of specific evidence of Glover's involvement in that sale he was not charged in Count Three of the indictment.

other "front" men employed in earlier operations by co-defendant Epstein. As to the first *Brady* claim, Judge Metzner correctly determined that through Government disclosures defendant was placed on adequate notice of the information which he claims could have been used to cross-examine Lewis. Glover's second *Brady* claim, advanced for the first time on appeal, simply does not relate to information exculpatory of defendant, particularly in the absence of a demand by Glover in the District Court for *Brady* information of this specific nature.

A. The Substance of McGuiness' Statements Concerning Lewis Was Disclosed to Defense Counsel.

As indicated in the statement of facts, see *supra* at 4-5, during a recorded meeting conversation on October 4, 1976, between McGuiness and Lewis, McGuiness made specific reference to his prior narcotics dealings with Lewis. At the time of the conversation, Lewis did not respond to McGuiness' remarks. On May 16, 1977, over two months prior to trial, a transcript and copy of the tape recording of this conversation were given to all defense counsel, including counsel for defendant Glover.* At trial, counsel for Glover acknowledged that he listened to *all* tapes and read *all* the transcripts—including this one—provided to him. (Tr. 795).

Just prior to the commencement of trial, defendant McGuiness pleaded guilty to Count One of the indictment and, at that time, counsel for Glover and Epstein became aware that McGuiness had agreed to cooperate with the Government. Thereafter, while the trial was in progress, McGuiness discussed with the prosecutor, Assistant United

* The transcript and tape were turned over with copies of all tape recordings and corresponding transcripts made during the investigation.

States Attorney Thomas H. Sear, McGuiness' involvement with the other defendants in the "speed." In connection with this discussion McGuiness asserted, as he had stated in the tape recorded conversation of October 4, 1976 (Gov. Ex. 26, p. 16), that he had made two earlier sales of "speed" to Lewis, prior to the November, 1976 transaction.* (Tr. 785).

McGuiness' contention that he had sold drugs to Lewis prior to November was in conflict with what Lewis had told DEA agents and with Lewis' trial testimony, wherein Lewis denied prior narcotics purchases from McGuiness. (Tr. 180). This conflict, however, was made apparent from the October 4th tape and from the DEA debriefing reports, GX. 3501 I, J and K, which made clear that Lewis had told DEA that his first deal with McGuiness was in November, 1976. (Tr. 803).

The prosecutor, who in any event did not believe that McGuiness was accurately telling the truth with respect to the alleged prior deals with Lewis, did not advise defense counsel in the course of the trial of McGuiness' reaffirmation of the information already provided through the October 4, 1976 tape recording. (Tr. 785, 789, 803).**

* Specifically, McGuiness indicated that the sales occurred some time in August or September.

** By the same token, however, the prosecutor made no attempt to hide the nature of the conflict. At his July 19, 1977 meeting with McGuiness, the prosecutor told McGuiness that he believed he was basically cooperating. However, he also told McGuiness that he believed McGuiness was lying or mistaken about the two prior deals and that at the time of McGuiness's sentence he would so inform the Court as to his evaluation. As anticipated by the prosecutor, McGuiness told his lawyer about the matter who relayed the information to counsel for Mr. Glover but only after the jury had retired to deliberate. (Tr. 783, 791). The July 19th meeting occurred on a Tuesday, after the bulk of Lewis' testimony had been completed, but prior to its conclusion. (Tr. 112-213, 527-31).

While the jury was deliberating, counsel for Glover advised the trial judge that he just had learned from McGuiness' lawyer of McGuiness' alleged prior dealings with Lewis. In the course of a colloquy on the matter, defense counsel conceded that he had knowledge prior to trial of the October 4th conversation in which McGuiness stated he had dealt with Lewis before November (Tr. 796), but claimed he was not aware of its *Brady* nature until he learned—allegedly only moments before—that Lewis denied the sales to McGuiness. Judge Metzner considered defendant's motion to set aside the verdict* and concluded that defense counsel, without doubt, was on sufficient notice of the alleged exculpatory matters. Indeed, in rejecting Glover's purported *Brady* claim, the trial judge emphasized that defendants specifically knew from the October 4th conversation of McGuiness' allegation that he had dealt before with Lewis, and that Lewis denied such dealings under oath at trial. (Tr. 799-800, 805).**

The factual recitation set forth above makes plain that Glover was placed on more than adequate notice by the Government of the facts now claimed to have amounted to a *Brady* violation. This Court consistently has held that there is no *Brady* violation where the defendant is on notice of the essential facts that would enable him to pro-

* In the midst of the argument on the motion the jury returned its guilty verdicts as to Glover and Epstein.

** Glover misleadingly now takes issue with Judge Metzner's determination that the October 4th conversation put him on notice of Lewis' alleged dealings with McGuiness, by contending that McGuiness' comment could have been a reference to cocaine. (Br. at 7). First, in the context of the October 4th negotiation—which specifically was for methamphetamine—it surely was clear that McGuiness was referring to the very dangerous substance then under discussion. More importantly, Lewis at trial denied dealing in *any* drug with McGuiness prior to November; if, as Glover now asserts, it was the denial which was critical for *Brady* purposes, he clearly was apprised of the discrepancy.

duce the alleged exculpatory evidence. *United States v. Erb*, 543 F.2d 438, 443 (2d Cir. 1976); *See also, United States v. Corey*, Dkt. No. 77-1308, slip op. 585, 588 n.5 (2d Cir. Nov. 30, 1977); *United States v. Robinson*, 560 F.2d 507, 518 (2d Cir. 1977) (en banc); *United States v. Stewart*, 513 F.2d 957, 960 (2d Cir. 1975); *Williams v. United States*, 503 F.2d 995, 998 (2d Cir. 1974) (per curiam); *United States v. Tramunti*, 500 F.2d 1334, 1349-50 (2d Cir. 1974); *United States v. Brawer*, 496 F.2d 703 (2d Cir. 1974); *United States v. Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). Under the cited authority Judge Metzner's determination surely was correct that the Government did not engage in any kind of suppression of evidence since it knew defense counsel was on actual notice of McGuiness' information.

Glover contends, however, that the Government's disclosure was not sufficient because he was not aware of the *Brady* nature of McGuiness' allegations until the case already was submitted to the jury. To support this far-fetched claim, Glover asserts that what interested him for trial-tactical purposes was not merely the alleged fact that Lewis had dealt with McGuiness in the past, but Lewis' denial to DEA of such prior dealings. Even assuming *arguendo* that Glover principally was interested in Lewis' denial, it is manifest that he had full knowledge of Lewis' position on this matter *under oath*, and yet failed to pursue an inquiry with the available facts. Thus, on cross-examination, Lewis denied that he had previously purchased "drugs" from McGuiness; nevertheless, in the face of this denial and its apparent contradiction of McGuiness' recorded October 4th statement, counsel did not pursue a further inquiry.* Since, as Judge

* The absurdity of Glover's position is best demonstrated by his suggestion that he was not interested in Lewis' denial *under oath* of earlier dealings with McGuiness, but only with Lewis' *unsworn* denial to the DEA agents. It needs little

[Footnote continued on following page]

Metzner observed, defendant was on ample notice of facts * which provided the groundwork for all of the inquiries of which Glover now claims he was deprived, the District Court properly rejected as without basis defendant's *Brady* motion.**

B. The Government Was Not Required Under *Brady* To Disclose That Epstein Had Used "Front Men" Besides Glover In Earlier Transactions.

The second part of Glover's *Brady* claim is that the Government should have disclosed to him the names of other individuals whom it had evidence to believe acted as "front men" or "enforcers" for Epstein in unrelated earlier narcotics dealings. It is a complete answer to this half-hearted claim that Glover never sought such information from the Government in the District Court,

elaboration to point out that the testimonial denial was of far more impeachment value, if at all, to Glover than the mere omission of such information in debriefings to DEA agents. In any event, Glover was on notice of the absence of Lewis' admission to the alleged earlier McGuinness deals in the agency reports turned over pursuant to 18 U.S.C. § 3500. (GX 3501 I, J, K).

* Judge Metzner observed to counsel, with reference to the May, 1977 turnover of the Oct. 4, 1976 recording: "You had the information that gave you the lead to look into it for two months now." (Tr. 805). The trial judge also pointed out that McGuinness, who had entered a guilty plea on the morning of the first day of trial, was available to defense counsel for interview on this very point.

** Not surprisingly, in both the District Court and this Court, defendant has overstated the significance of the McGuinness matters. First, and obviously, McGuinness' claimed contradiction of Lewis was not directly exculpatory of Glover. Second, Lewis had been subjected to a full and complete cross-examination by both defendants, with emphasis on his cooperation agreement with the Government and his motive to testify. Thus, the matters proposed for inquiry would have been at most cumulative.

and that its earlier production* could not possibly have had any impact on the outcome of the trial.

In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court addressed at length the standard of materiality to be applied when there has been alleged suppression of exculpatory evidence. In holding that a prosecutor does not violate his constitutional duty of disclosure unless the omitted evidence is sufficiently significant to result in denial of defendant's right to a fair trial, the Court drew a clear distinction as to the test of materiality to be applied, depending upon whether or not defendant had put the prosecutor on clear notice of the specific nature of the exculpatory evidence desired. In this case, although Glover filed a *Brady* demand which made some specific reference to impeachment materials relating to Government witnesses, at no point in his demand did he advise the Government either of the nature of his defense or of the claimed significance of other "front men" or "enforcers" for Epstein. Thus, under *Agurs*, Glover would have to show that, assuming suppression, the information withheld would have created a reasonable doubt where none in fact existed. 427 U.S. at 112-13. See also, *United States v. Erb*, *supra*; *United States v. Stassi*, 544 F.2d 579, 584 (2d Cir. 1976).

In this regard, application of the *Agurs* standard makes clear that the allegedly suppressed evidence could not have affected the verdict and indeed was not at all exculpatory of Glover. The "front men" to whom the Government made reference in the sentencing memoran-

* In making this appellate claim, Glover relies on a brief passage in the Government's sentencing memorandum, submitted in connection with the Epstein sentence and therefore never served on Glover, see *infra*, at 17-18, which referred to a list of 3 other men used by Epstein as "trusted associates" to "deliver and collect monies from drug dealers."

dum, operated for Epstein long before the Fall and Winter of 1976-77, when Glover occupied his position of responsibility with Epstein. In short, these other front men were completely out of the picture by the time they were replaced by Glover and his co-defendants. Moreover, here Glover's role in the conspiracy was confirmed not merely by his actions in and around Epstein's apartment during the December 30th sale, but by Conner's recorded specific emphasis of Glover's position as an alter-ego for Epstein. Finally, evidence as to the pattern of use by Epstein of other "front men," rather than help Glover, likely would have buttressed the Government's position that Epstein would not personally involve himself in narcotics deals and used another for protection; in this case Glover himself.

POINT II

Glover's Sentence Was In All Respects Proper.

After trial, the government submitted a memorandum to be considered in imposing sentence on defendant Epstein in light of the nature of Epstein's long standing involvement in the business of selling large quantities of speed. In the memorandum, the substance of which explicitly was addressed solely to Epstein, there appeared the following reference to Glover:

"Epstein insulated himself and his activities by having trusted associates deliver and collect monies from drug dealers. In particular Epstein used John Festa, Vito Toreao, Samuel Glover and Genaro Sirico for those purposes. In fact, Glover was convicted in this case based on his acting as Epstein's "front man" and other evidence confirmed his role as an enforcer for Epstein." (Government's Sentencing Memorandum As To Harold Epstein, August, 1977).

Since the intent of the memo exclusively was to address relevant factors connected to the sentencing of Epstein, no copy of the memorandum was served on Glover's counsel. Glover now urges that the brief reference to him in the Epstein memorandum requires a remand for resentencing, even though there is nothing in the record which suggests that Judge Metzner considered the reference in any manner. This claim is without merit.

The record of the sentence proceeding makes crystal clear that no consideration whatsoever was given to the Glover reference in the Epstein memorandum.

Sentence for both Epstein and Glover had been set for September 16, 1977. When Epstein failed to appear, Glover alone was sentenced. At Glover's sentence the Government made no attempt to bring any information not developed at trial to the attention of the District Court, and in fact made no comment at all regarding Glover. (Sentencing Minutes of September, page 3). In sentencing Glover on that day, the District Court explicitly set forth the considerations relied upon, in addition to the fact of conviction, in determining the nature of the sentence:

"[Y]ou are thirty years old, with eighteen previous arrests and six convictions. There is a serious one there, a felony of carrying a gun for which you served a year . . .

* * * * *

You were sentenced on April 16, 1974. Now we are dealing with events in 1976, with no employment background.

In view of that, with that background I am sentencing the defendant to a year and a half on Count 1, to be followed by three years' Special Parole." (Sentencing Minutes of September 16, 1977, 9-10).

The trial judge thus quite clearly stated his reasons for sentencing Glover and did not intimate in any fashion reliance on the Government's memorandum reference to Glover as an "enforcer"; rather the trial judge stated that Glover's long standing lack of employment and a very serious prior criminal record, involving in one instance a weapons conviction, coupled with the fact of conviction in the present case prompted his action. In view of Judge Metzner's specific and exhaustive statement of proper reasons for the imposition of the sentence in this case, no occasion is prevented for appellate review of that sentence.

Indeed, this Court repeatedly has made clear that absent unusual circumstances clearly violative of due process, a sentence imposed within the statutory maximum will not be reviewed. *E.g.*, *United States v. Kaplan*, Dkt. No. 77-1428, slip op. 1465 (2d Cir. February 3, 1978); *United States v. Seijo*, 537 F.2d 694 (2d Cir. 1976). Moreover, the Court has emphasized that even when a trial court has received improper or mistaken information, or information not relayed to defense counsel, review of a sentence is uncalled for if it appears that the trial judge did not rely on that information in sentencing. *United States v. Lamont*, 565 F.2d 212 (2d Cir. 1977); *United States v. Armedo-Sarmiento*, 545 F.2d 785, 795 (2d Cir. 1976); *United States v. Butler*, 541 F.2d 730, 732 (8th Cir. 1976); *United States v. Dixon*, 538 F.2d 812 (9th Cir. 1976); *Santoro v. United States*, 462 F.2d 612 (9th Cir. 1972). It is only when there is a probability, or at least a realistic possibility, that material information has been considered and relied on by the court, and where defense counsel has had no fair opportunity to attempt to show its inaccuracy, that such review is appropriate. *Townsend v. Burke*, 334 U.S. 736 (1948); *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976); *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976); *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973); *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970).

In this case, quite apart from the fact that Judge Metzner made no reference at all to the comment in the Epstein memorandum, there simply is no reason to speculate that the experienced trial judge would have considered this comment without mentioning it. First, the Government's sentencing memorandum specifically advised that it was to be considered in connection with Epstein's sentence alone. Second, the reference to Glover in the memorandum about which he now complains was merely a brief conclusory comment which clearly was not made in an attempt to influence the sentence which might be imposed on Glover. In fact, as noted earlier, the Government made no effort to supplement or even restate the record as to the culpability of Glover, or to urge that a harsh sentence be imposed against him.

Finally, even if it had been considered, the reference to Glover was not of a nature to have influenced the court and did not propound any specific facts outside the record.* Moreover, Judge Metzner had presided at the six day trial in this case and therefore was in the best position to judge the evidence of Glover's role in the conspiracy, which clearly showed him to be a front man for Epstein.**

In sum, on the record in this case, the sentence of eighteen months imposed against Glover was fair and proper, and there is no basis to remand for resentencing.

* There was no elaboration in the memorandum—factual or otherwise—as to Glover's status as an "enforcer."

** Contrary to defendant's claim there was evidence in the record tending to show Glover's role as an "enforcer." Connerton specifically referred to Glover as a "torpedo" and a "bodyguard." *Supra* at 9.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)

ss.:

County of New York)

Thomas H. Seay.

being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *21st* day of *February*, 1978
he served a copy of the within *Brief*
2 copies of
by placing the same in a properly postpaid franked
envelope addressed:

Mark LEMLE AMSTERDAM, Esq.
299 Broadway
New York, New York 10007

And deponent further says that he sealed the said
envelope and placed the same in the mail box for mailing
at One St. Andrew's Plaza, Borough of Manhattan, City of
New York.

I declare under penalty of perjury that the foregoing
is true and correct. Executed on February 21, 1978.
Thomas H. Seay

Sworn to before me this

day of